In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 942

THOMAS KERR and BARBARA KERR, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The taxpayer owned all of the outstanding stock of two corporations: Helix Milling Company and Kerr Grain Corporation. Neither had ever declared a dividend, although Helix, which had been formed in 1947, had an earned surplus of over $130,000 in June of 1955. In October of that year, the taxpayer sold all the stock in Kerr Grain to Helix for a $50,000 note. The transfer was not required by creditors as a condition to the future financing of either

corporation (Pet. 38-39), and neither corporation curtailed in any way its activities after the sale.

Section 304 of the Internal Revenue Code of 1954 provides that when one or more persons are in control of each of two corporations and one of the corporations purchases stock of the other from the controlling shareholder or shareholders, the transaction "shall be treated as a distribution in redemption of the stock of the corporation acquiring such stock." The purpose of that provision is to subject such transactions through related corporations to the provisions of Section 302 of the 1954 Code. See S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 239-240. Section 302 in turn provides that, if a corporate distribution in redemption of stock is essentially equivalent to a dividend, it shall be treated for federal tax purposes as a dividend.

The courts below held, after a detailed analysis of the full context of the transaction, that the purchase of taxpayer's stock in one wholly owned corporation (Kerr Grain) by Helix, another wholly owned corporation, resulted in a payment of $50,000 to the taxpayer that was essentially equivalent to payment of a dividend by Helix. Section 302 incorporates much the same standards for determining whether a distribution is essentially equivalent to a dividend as were applicable under its predecessor provision, Section 115 (g) (1) of the Internal Revenue Code of 1939. See S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 44, 233-237; *Radnitz* v. *United States*, 187 F. Supp. 952 (S.D.N.Y.); affirmed *per curiam*, 294 F. 2d 577 (C.A.

2d). Applying those criteria, the court below reached a correct conclusion. The taxpayer continued to control both corporations despite the transfer. He remained entitled to all the benefits of the operations of each. The transfer was not necessitated by business conditions. Its net effect was to transfer $50,000 from a wholly owned corporation to its shareholder.

In the context of the facts of this case, no important question regarding the application of Sections 302 and 304 is presented, nor is there a conflict among the circuits requiring resolution by this Court. The taxpayer's argument that Section 304 is unconstitutional as an income tax on a return of capital is without merit for the reasons set forth by the court of appeals (Pet. 62-64). The Internal Revenue Code only purports to tax transfers between commonly-owned

---

The numerous factors which were given consideration by the courts below in determining whether the distribution here was essentially equivalent to a dividend have been spelled out in considerable detail by the different courts of appeals. In looking to the net effect of the distribution as the single most important factor for dividend equivalence the Tax Court and the Ninth Circuit followed the rule consistently enunciated by the courts of appeals. See, for example, *Bradbury* v. *Commissioner*, 298 F. 2d 111 (C.A. 1st); *Northup* v. *United States*, 240 F. 2d 304 (C.A. 2d); *Kessner* v. *Commissioner*, 248 F. 2d 943 (C.A. 3d); *Ballenger* v. *United States*, 301 F. 2d 192 (C.A. 4th); *United States* v. *Powell*, 253 F. 2d 196 (C.A. 5th); *Bell* v. *Commissioner*, 248 F. 2d 947 (C.A. 6th); *Commissioner* v. *Snite*, 177 F. 2d 819 (C.A. 7th); *Heman* v. *Commissioner*, 283 F. 2d 225 (C.A. 8th); *Pacific Vegetable Oil Corp.* v. *Commissioner*, 251 F. 2d 682 (C.A. 9th); *Jones* v. *Griffin*, 216 F. 2d 885 (C.A. 10th) and *Flanagan* v. *Helvering*, 116 F. 2d 937 (C.A.D.C.).

corporations which are essentially equivalent to payment of a dividend and which do not actually involve a taxpayer's relinquishing the benefits of ownership of property. Here the taxpayer continued to enjoy the benefits of owning Kerr Grain Corporation even after his stock in Kerr Grain was transferred to another corporation he alone owned (Helix).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

MELVA M. GRANEY,
JONATHAN S. COHEN,
Attorneys.

MAY 1964

U. S. GOVERNMENT PRINTING OFFICE 1964 • 731280 992